

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0835-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

In re the Marriage of:

**SHAWN KRENKE, n/k/a
SHAWN VAN GOMPEL,**

Petitioner-Respondent,

v.

TIMOTHY KRENKE,

Respondent-Appellant.

APPEAL from an order of the circuit court for Outagamie County:
HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Timothy Krenke appeals an order finding him in contempt for being in arrears on his child support obligation, requiring him to pay 17% of his income or \$116 per week, whichever is greater, as child support, and awarding his former wife, Shawn Van Gompel, \$500 as contribution

toward her attorney fees in bringing the contempt action.¹ Timothy contends that the trial court erred by: (1) utilizing his earning capacity rather than his actual earnings in making the finding of contempt and in setting his child support obligation; (2) setting his child support obligation at 17% of his gross income or \$116 per week, whichever is greater, effective retroactively to January 27, 1995; and (3) awarding a contribution toward attorney fees without making proper findings of Timothy's ability to pay and Shawn's need for contribution. We reject these arguments and affirm the order.

Timothy and Shawn were divorced in 1988. The divorce judgment awarded Shawn sole legal custody and primary physical placement of the only child born of the marriage. Timothy was awarded alternate physical placement and ordered to pay 17% of his gross income for child support.

Timothy had been employed full time by Town & Country Electric as an electrician for approximately eleven years. Timothy's annual earnings totaled approximately \$47,100 in 1991, \$37,500 in 1992, \$32,600 in 1993, and \$34,800 in 1994. Timothy experienced seasonal layoffs between five to twelve weeks during the winter months for each of these years. Timothy refused to accept job assignments that were available but required travel in excess of sixty miles from his home office in Stevens Point because he claimed accepting those job assignments interfered with his visitation rights. In January 1995, Timothy enrolled at the University of Wisconsin – Marathon Center, pursuing a degree in biological science and thereafter worked part-time.

Because Timothy had been laid off in November 1994 and he started school full time in January 1995, Timothy's child support payments suffered a substantial reduction. On May 1, 1995, Shawn filed an order to show cause why Timothy should not be held in contempt of court for failing to make child support payments. Shawn also requested that the family court commissioner award an arrearage of \$140 per week from November 1994. After a hearing, the family court commissioner declined to find Timothy in contempt. Shawn sought de novo review of the decision in the trial court. After a hearing, the trial court rendered a written decision, finding Timothy in contempt for

¹ This is an expedited appeal under RULE 809.17, STATS.

shirking his child support obligation based on its finding that Timothy unreasonably reduced his income by becoming a full-time student.

Subsequently, the trial court held a hearing based on the family court commissioner's order for a minimum payment of \$111 per week and to clarify its written decision. The trial court concluded that when Timothy became a full-time student on January 27, 1995, he unreasonably reduced his income and consequently his ability to make child support payments. The trial court therefore found Timothy in contempt for shirking his child support obligation, ordered him to pay 17% of his gross income or \$116 per week, whichever is greater, effective January 27, 1995, and awarded Shawn \$500 as contribution for her attorney fees. Timothy appeals the order.

Timothy first contends that the trial court erred by using his earning capacity instead of actual earnings in making the finding of contempt and in setting his child support obligation. Timothy argues that the trial court erred when it found that he was shirking. We disagree.

The trial court may consider earning capacity when a spouse is shirking his or her child support obligations. *Van Offeren v. Van Offeren*, 173 Wis.2d 482, 496, 496 N.W.2d 660, 665 (Ct. App. 1992). Shirking does not require a finding that the spouse deliberately reduced his or her earnings to avoid support obligations. *Id.* The trial court may find a spouse is shirking if it finds that the employment decision was both voluntary and unreasonable under the circumstances. *Id.* The employment decision may be unreasonable even though it is well intended. *Id.*

The issue whether a spouse's employment decision is unreasonable presents a question of law. *Id.* at 492, 496 N.W.2d at 663. However, because the trial court's legal conclusion is intertwined with factual findings supporting that conclusion, we will give the trial court appropriate deference. *Id.* at 492-93, 496 N.W.2d at 663.

The trial court found that Timothy was shirking his support obligation based on the following findings: (1) Timothy had a well-paying position he voluntarily left to attend school, (2) he limited his earnings by

electing to work only within a specified area, and (3) his earning capacity created by his schooling would not enable him to earn as much as he was earning as an electrician. We agree with the trial court's analysis.

Timothy is an electrician who has enjoyed earnings ranging between \$32,000 and \$48,000 over the past several years. While Timothy contends that his income was declining due to a slowdown in work, there was sufficient evidence that Timothy would have continued to enjoy substantially greater earnings as an electrician had he not restricted his employment based upon the distance necessary to travel to a job. In addition, the course of study in which Timothy enrolled would take approximately four years, during which he would be unable to make any significant child support payments. Although Timothy's exact income for 1995 was not entered into evidence, Shawn testified that Timothy made no child support payments from February 14, 1995, to June 16, 1995. Because Timothy was required to pay 17% of his earnings as child support, the inference that Timothy had no earnings during this time supports the trial court's finding that Timothy's income was substantially reduced. Finally, the trial court recognized that Timothy's potential earnings as a graduate would have commanded a salary less than what he enjoyed as an electrician.

Considering that Timothy's ultimate earnings would not be substantially greater than now enjoyed, it would take a substantial amount of time to obtain his degree and find new employment, and he would surrender substantial earnings by his university enrollment, we agree with the trial court's conclusion that Timothy's decision was unreasonable. A child support obligation is meaningful both legally and morally. While a party should enjoy the ability to select a career path that reflects his or her goals and desires, a party may not do so at the expense of his child's subsistence and welfare. In this case, Timothy's course of study would be prolonged, his ultimate earnings comparable to those now enjoyed, and his ability to make meaningful child support payments dramatically reduced for several years. The fact that he is a skilled tradesman with significant earning capacity may require that he postpone an alternate career path until he has fully discharged or insured his child support obligation.

Timothy next contends that the trial court erroneously exercised its discretion when it ordered him to pay 17% of his gross income or \$116 per

week as child support effective January 27, 1995. We will sustain the trial court's exercise of discretion as long as it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

In this case, the trial court properly based its child support order on Timothy's earning capacity. Because that capacity has consistently run between \$30,000 and \$50,000 per year, the minimum payment of \$116 per week is a reasonable exercise of discretion. It represents less than 16% of his average income and approximately 17% of a \$35,500 per year salary. We see no erroneous exercise of discretion in the court entering an order based upon 17% of the assumed earning capacity reflected by Timothy's past earnings.

Timothy suggests that the retroactive application of the support order was in effect a punitive sanction, not a remedial sanction. We disagree. While the trial court may not retroactively modify a child support obligation under § 767.32(1m), STATS., it can, under its remedial contempt powers, impose a sanction of a money payment sufficient to compensate a party for a loss suffered as a result of a contempt of court. Section 785.04(1)(a), STATS. Once Timothy started school in January 1995, he was unavailable for full-time employment and was shirking his support obligation. Therefore, setting the \$116-per-week floor effective January 27, 1995, was necessary to calculate the arrears based on Timothy's earning capacity for the time he was in contempt for shirking his support obligation. Thus, setting the child support obligation floor as of January 27 was compensation for child support lost due to Timothy's shirking of his obligation. This is a reasonable exercise of the trial court's remedial contempt powers.

Finally, Timothy argues that the trial court erred by ordering him to pay a \$500 contribution toward Shawn's attorney fees as costs for bringing the contempt action. Timothy argues that the trial court did not make proper findings of his ability to pay or Shawn's need for a contribution toward attorney fees. While these findings are necessary to award attorney fees in a divorce proceeding, *Kastelic v. Kastelic*, 119 Wis.2d 280, 289, 350 N.W.2d 714, 719 (Ct. App. 1984), a different standard applies in contempt proceedings. In contempt proceedings, the trial court is permitted to impose a sanction of payment of a sum of money sufficient to compensate a party for a loss suffered as a result of a

contempt of court. Section 785.04(1)(a), STATS. The cost of attorney fees in pursuing a contempt action are recoverable under § 785.04(1)(a). *Seymour v. Eau Claire*, 112 Wis.2d 313, 320, 332 N.W.2d 821, 824 (Ct. App. 1983). When it awarded Shawn attorney fees, the trial court was fixing the extent of Timothy's obligation for the contempt, not setting a purge condition where ability to pay is a relevant consideration. Because there is no requirement that the trial court make findings of need and ability to pay before exercising its remedial contempt powers in fixing the extent of Timothy's obligation for the contempt, we reject Timothy's argument.

In sum, we conclude that: (1) the trial court did not err by concluding that Timothy's employment status was unreasonable in light of his child support obligation; (2) the trial court did not erroneously exercise its discretion by setting Timothy's child support obligation at 17% of his gross income or \$116 per week, whichever is greater, effective January 27, 1995, and (3) the trial court was not required to make findings of need and ability to pay before awarding attorney's fees for bringing the contempt action. Therefore, we affirm the order.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.